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Nos. 85-1083 and 85-6019

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In the Supreme Court of the United States

OCTOBER TERM, 1985

KENT AUGUST MOECKLY, PETITIONER

v.

UNITED STATES OF AMERICA

WILLIAM J. COULOMBE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Both petitioners contend that the district court erred in refusing to instruct the jury on venue. Petitioner Moeckley also claims that the district court erred in denying his motion for a severance.

1. Following a jury trial in the United States District Court for the District of Minnesota, petitioners and co-defendant Joseph Ramirez were convicted of conspiring to import cocaine, in violation of 21 U.S.C. 963, and conspiring to possess cocaine with the intent to distribute it, in

violation of 21 U.S.C. 846.[1] Petitioner Moeckly was also convicted on two counts of perjury before a grand jury, in violation of 18 U.S.C. 1623.[2] Petitioner Moeckley was sentenced to seven years' imprisonment and was fined $10,000. Petitioner Coulombe was sentenced to ten years' imprisonment and was fined $10,000. 85-1083 Pet. App. A2. The court of appeals affirmed (85-1083 Pet. App. A1-A24; 769 F.2d 453).

The evidence adduced at trial, the sufficiency of which is not in dispute, is set out in the opinion of the court of appeals (85-1083 Pet. App. A2-A8). Briefly, it showed that between 1981 and 1983, petitioners participated in a conspiracy to import large amounts of cocaine from South America. The cocaine was smuggled into Florida aboard airplanes owned by co-defendant Ramirez, who operated a private aircraft storage and maintenance facility in Minnesota. Moeckley was Ramirez's co-pilot on some smuggling flights in the fall of 1981, and throughout the conspiracy Moeckley and Ramirez deposited large amounts of cash into banks in Minnesota (*id.* at A2-A3, A7). Coulombe piloted the aircraft on one of the smuggling missions (*id.* at A3-A5).

In April 1983, Ramirez arranged for Gregory Schmidt, who testified at trial for the government, to fly one of Ramirez's planes from Minnesota to Florida. Moeckley and Ramirez met Schmidt at the Fort Lauderdale airport, and the three installed additional fuel tanks in one of Ramirez's planes that had been used on earlier smuggling flights. Moeckley and Schmidt later prepared a large lunch for Coulombe, who was to fly the airplane to South America to pick up the cocaine. With Ramirez's help, they loaded

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[1]Co-defendant Ramirez's petition for a writ of certiorari was recently denied. *Ramirez* v. *United States*, No. 85-1046 (Feb. 24, 1986).

[2]Petitioner Moeckley was acquitted on one perjury count.

the lunch, a life raft, and other gear aboard the aircraft and connected auxiliary fuel pumps. Coulombe left for South America the next morning. 85-1083 Pet. App. A2-A3.

When Coulombe returned to Florida airspace the following day, Moeckly, Ramirez, and Schmidt were separately flying "cover" aircraft to determine if Coulombe was being pursued by United States Customs Service planes. Coulombe was alerted that he was being followed, and he diverted to the Bahamas with a Customs aircraft in pursuit. He landed on a dirt road near the Freeport airport and abandoned the plane, from which 398 pounds of cocaine were later seized. Ramirez and Schmidt picked up Coulombe in the Bahamas and returned to Ramirez's Florida home where petitioner Moeckly was waiting. Moeckly and Schmidt then flew to Minnesota in the plane that Schmidt had taken to Florida. 85-1083 Pet. App. A3-A5.

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, this Court recently denied a petition for a writ of certiorari filed by petitioners' co-defendant that presented the identical venue question. *Ramirez* v. *United States*, No. 85-1046 (Feb. 24, 1986). Accordingly, review by this Court of petitioners' fact-bound claims is not warranted.

a. Petitioners contend (85-1083 Pet. 7-9; 85-6019 Pet. 5-9) that they are entitled to a reversal of their convictions on the ground that the district court failed to instruct the jury on venue. That claim lacks merit.[3]

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[3]At the outset, since petitioner Moeckley did not raise the venue issue in the court of appeals, he may not do so for the first time at this point. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, the absence of a venue instruction did not deny him a fair trial, for the reasons given in the text.

It is well settled that a conspiracy may be prosecuted in the district in which the agreement was formed or in which any member committed any overt act in furtherance of the conspiracy. See, *e.g.*, *Hyde* v. *United States*, 225 U.S. 347 (1912). It is also clear that proper venue need be established only by a preponderance of the evidence and not beyond a reasonable doubt. See, *e.g.*, *United States* v. *Rodgers*, 755 F.2d 533, 549 n.19 (7th Cir. 1985), cert. denied, No. 84-6500 (July 1, 1985); *United States* v. *Black Cloud*, 590 F.2d 270, 272 n.2, 273 (8th Cir. 1979). Petitioners claim that the district court should have instructed the jury on the question of venue. However, the court of appeals agreed with petitioners (85-1083 Pet. App. A12) and simply found that, given the "overwhelming" and "uncontradicted" proof of venue in Minnesota (*id.* at A14, A15), any error on that point was harmless.

As the court of appeals explained,the evidence of the acts committed in Minnesota, including the storage and shuttling of the planes, was "uncontroverted and substantial" (85-1083 Pet. App. A14). The planes that flew the cover operations and the April 1983 smuggling mission were stored in Minnesota and shuttled from Minnesota to Florida, and the profits from smuggling activity were deposited in Minnesota (*id.* at A14, A15). Petitioners do not dispute any of those facts. Moreover, petitioners do not claim that their defense was in any way impaired (for instance, by the inability to present witnesses in their defense) or that they suffered any unique personal hardship because they were tried in Minnesota, rather than in Florida. The court of appeals therefore correctly found (*id.* at A15) that any error in the district court's failure to instruct the jury on the issue of venue was harmless.

Referring to *Bollenbach* v. *United States*, 326 U.S. 607 (1946), petitioners suggest that the failure to instruct on venue can never be harmless. *Bollenbach*, however, does

not stand for that proposition. In *Bollenbach*, the Court held that an erroneous response to a question from the jury that the jury obviously regarded as critical could not be considered harmless simply because a reviewing court regarded the evidence in the case as compelling. The courts of appeals that have addressed the question presented by this case have held that the failure to instruct on venue can be harmless if the issue of venue is not in dispute, or if the evidence supporting the government's proof of venue is overwhelming. See *United States* v. *Netz*, 758 F.2d 1308, 1312 (8th Cir. 1985); *United States* v. *Winship*, 724 F.2d 1116, 1125-1126 & n.13 (5th Cir. 1984); *United States* v. *Massa*, 686 F.2d 526, 530-531 (7th Cir. 1982); *United States* v. *Jenkins*, 510 F.2d 495, 498-499 (2d Cir. 1975); *United States* v. *Gillette*, 189 F.2d 449, 452-454 (2d Cir.), cert. denied, 342 U.S. 827 (1951).[4] Accordingly, because "the court [of appeals] undertook a thorough inquiry and made clear the basis of its decision" that the error in this case was harmless (*Francis* v. *Franklin*, No. 83-1590 (Apr. 29, 1985), slip op. 18 n.10), review by this Court of petitioners' fact-bound claim is not warranted.[5]

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[4]The court of appeals' decision does not conflict with *Green* v. *United States*, 309 F.2d 852 (5th Cir. 1962). In *Green*, the court of appeals reversed on another issue and therefore was not required to consider whether the error in failing to instruct on venue could be harmless. In a subsequent decision, the Fifth Circuit has made it clear that such an error is subject to harmless error analysis. *United States* v. *Winship*, 724 F.2d at 1126 n.13.

[5]Petitioners erroneously assert (85-1083 Pet. 7; 85-6019 Pet. 8), that the court of appeals' decision conflicts with *United States* v. *Jackalow*, 66 U.S. 484 (1861), and *United States* v. *Black Cloud*, *supra*. As the court of appeals explained (85-1083 Pet. App. A10-A12), in both cases there was conflicting evidence concerning where the crime took place, whereas in this case uncontroverted evidence clearly proved that venue was proper in Minnesota. In addition, any asserted conflict between the Eighth Circuit's decision in this case and its earlier decision in *Black Cloud* is for the Eighth Circuit, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

b. There is also no merit to petitioner Moeckley's claim (85-1083 Pet. 5-7) that the district court erred in refusing to sever his trial from that of co-defendant Ramirez because of the allegedly disproportionate evidence adduced against Ramirez. Although Ramirez was the apparent ringleader of the smuggling venture, petitioner Moeckley was linked to the scheme from its inception, and he participated in every essential aspect of it. He prepared the aircraft for Coulombe's April 1983 trip to South America, he flew cover to detect Customs planes when Coulombe returned from South America with cocaine, and he deposited illicit drug proceeds in Minnesota banks. Furthermore, as the court of appeals correctly held (85-1083 Pet. App. A21), essentially the same evidence would have been admissible against Moeckley in a separate trial on the conspiracy charge.

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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